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COMMENT

Federal Sentencing Error as Loss of Chance

In July 2010, a federal district court sentenced DeAngelo Whiteside to seventeen years and six months in prison for a drug offense.[1] Under Fourth Circuit precedent, Mr. Whiteside's two prior state drug convictions triggered application of the Federal Sentencing Guidelines' "career offender" enhancement.[2] On the facts of Mr. Whiteside's case, the Guidelines recommended between twenty-one and twenty-eight years in prison.[3] The district court arrived at its ultimate sentence after granting the government's motion for a shorter sentence due to Mr. Whiteside's cooperation.[4]

If Mr. Whiteside had been sentenced just over a year later, he would not have been a "career offender."[5] In 2011, the Fourth Circuit determined that the Circuit had misinterpreted which state convictions qualify as "prior felony con-

1. *See* Whiteside v. United States, No. 1:09-cr-00069-MR-1, 2013 WL 2317693, at *1 (W.D.N.C. May 28, 2013); Whiteside v. United States (*Whiteside I*), 748 F.3d 541, 544 (4th Cir. 2014), *rev'd en banc on other grounds*, 775 F.3d 180 (4th Cir.). Mr. Whiteside pled guilty to possession with intent to distribute fifty grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) (2012). *Id.* at *1.

2. *See* United States v. Harp, 406 F.3d 242, 246-47 (4th Cir. 2005), *overruled by* United States v. Simmons, 649 F.3d 237 (4th Cir. 2011). Those age eighteen or above who are convicted of a felony crime of violence or drug offense and who have a minimum of "two prior felony convictions of either a crime of violence or a controlled substance offense" are designated "career offenders" under the Federal Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2014). In the federal sentencing matrix, a career offender's criminal history category is automatically designated as Category VI, the highest level, and the offense level is also subject to an enhancement. *Id.* § 4B1.1(b).

3. *Whiteside*, 2013 WL 2317693 at *1.

4. *See Whiteside I*, 748 F.3d at 544.

5. *See Simmons*, 649 F.3d at 247. For state convictions to qualify as prior felony convictions for career offender purposes, they must be punishable by more than one year in prison; whether the state designates the conviction as a felony is immaterial. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2014). Mr. Whiteside's two prior North Carolina drug convictions, for possession with intent to sell and deliver cocaine and possession with intent to sell and deliver marijuana, qualified as prior felony convictions in the Fourth Circuit when he was initially sentenced. *See* Brief of Appellee at 8, *Whiteside I*, 748 F.3d 541 (No. 13-7152).

victions" that trigger the career offender enhancement.[6] Under the proper interpretation, Mr. Whiteside's prior offenses would not have warranted a heightened recommended sentence.[7] Instead, the Guidelines would have recommended a maximum prison term of roughly fourteen years and six months.[8] Assuming the same downward departure, Mr. Whiteside's sentence, if determined today, would be nine years and four months—a difference of about eight years of his life.[9]

Federal courts are currently locked in a debate over what to do with sentences like Mr. Whiteside's, in which the sentencing court misapplied[10] the Federal Sentencing Guidelines' career offender enhancement.[11] The core issue in this debate is whether misapplication of the Guidelines may be challenged post-conviction on collateral review.[12] In these cases, the sentencing court's application of the legal standard for career offender status has been invalidated, typically because the circuit's interpretation of a "prior felony conviction" has changed.[13] The sentencing court's use of that legal standard is, in retrospect, an erroneous application of law.[14] The question is whether such misapplications of law are cognizable in a later challenge under 28 U.S.C. § 2255.[15]

6. *See Simmons*, 649 F.3d at 247.

7. *Whiteside I*, 748 F.3d at 551.

8. Brief of Appellant at 5, *Whiteside I*, 748 F.3d 541 (No. 13-7152).

9. *Whiteside I*, 748 F.3d at 544.

10. Courts routinely refer to prior Guidelines misinterpretation as "erroneous application" or "misapplication." *See, e.g.*, *Whiteside I*, 748 F.3d at 546, 549.

11. *Compare* Hawkins v. United States, 706 F.3d 820, 823-24 (7th Cir. 2013) (denying collateral review), *reh'g denied*, 724 F.3d 915 (7th Cir.), *and* Sun Bear v. United States, 644 F.3d 700, 705-06 (8th Cir. 2011) (en banc) (same), *with* Spencer v. United States (*Spencer I*), 727 F.3d 1076, 1091 (11th Cir. 2013) (allowing collateral review), *rev'd en banc*, 773 F.3d 1132 (11th Cir. 2014), *and Whiteside*, 748 F.3d at 551 (same).

12. For readers unfamiliar with post-conviction challenges, "collateral review" challenges are those that occur in federal court after all direct appeals have been exhausted.

13. *See, e.g.*, *Hawkins*, 706 F.3d at 822 (finding that the Supreme Court's holding that a walkaway escape from prison is not a "violent felony" for career offender purposes meant that neither of Mr. Hawkins's predicate convictions were "prior felony convictions" qualifying him for the career offender enhancement).

14. *See, e.g.*, *id.*

15. Section 2255 is the primary post-conviction remedy for federal prisoners. *See* 28 U.S.C. § 2255 (2012); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1157 (6th ed. 2009) (describing § 2255 as federal prisoners' principal means of post-conviction relief). The career offender cases raise additional questions about the retroactive application of Guidelines changes in § 2255 proceedings. *See, e.g.*, Whiteside v. United States (*Whiteside II*), 775 F.3d 180, 187 (4th Cir. 2014) (en banc) (reversing the panel decision finding cognizability, on the grounds that equitable tolling of the one-year deadline for a § 2255 challenge was inappropriate); *Sun Bear*, 644 F.3d at 703-04 (declining to reach whether application of a provision of the Guidelines that is later de-

The test for cognizability in these cases is whether sentencing error constitutes a "complete miscarriage of justice."[16] If it does, then sentences like Mr. Whiteside's can be challenged on collateral review; if it does not, these sentences stand. Of the four circuits that have applied this test, the Seventh, Eighth, and Eleventh have held that career offender misapplication is not a fundamental miscarriage of justice.[17] The First Circuit recently found a career offender claim cognizable on its facts but declined to consider whether sentencing errors arising from a change in legal interpretation give rise to a § 2255 challenge.[18] In *Whiteside*, after a Fourth Circuit panel held that the error amounted to a fundamental miscarriage of justice, an en banc court reversed on the grounds that Mr. Whiteside's appeal was untimely.[19] All of these decisions, except the First Circuit's, hinged on a single vote.[20] Two were en banc.[21]

This Comment argues that courts have taken the wrong approach to cognizability. Circuit court opinions, and scholarly analysis of these opinions, have framed the argument over misapplication of the career offender enhancement as a conflict between individual fairness – the righting of a wrong by the legal system to an erroneously sentenced individual – and finality – the criminal justice system's interest in leaving final sentences undisturbed.[22] This Comment

termined to be erroneous is a "new substantive rule[]" for collateral review purposes). These questions are beyond the scope of this Comment.

16. *See* United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). *Addonizio* requires, for § 2255 cognizability, that the error have been "a fundamental defect which inherently result[ed] in a complete miscarriage of justice." *Id.* Courts frequently characterize the standard as "a fundamental miscarriage of justice." *See, e.g.*, Phillips v. United States, 734 F.3d 573, 580 (6th Cir. 2013); United States v. McGaughy, 670 F.3d 1149, 1159 (10th Cir. 2012).

17. Spencer v. United States (*Spencer II*), 773 F.3d 1132 (11th Cir. 2014) (en banc); *Hawkins*, 706 F.3d at 823-24; *Sun Bear*, 644 F.3d at 705-06.

18. Cuevas v. United States, No. 14-1296, 2015 WL 545132, at *4 (1st Cir. Feb. 11, 2015). The *Cuevas* court limited its decision to the particularly "exceptional" facts: post-sentencing, the state had vacated Cuevas's prior felony drug convictions qualifying him for the career offender enhancement after discovering systematic falsification of drug sample tests at a state laboratory. *Id.* at *1, *4.

19. *Whiteside I*, 748 F.3d 541, 547 (4th Cir. 2014), *rev'd en banc on other grounds*, 775 F.3d 180 (4th Cir.).

20. *Spencer II*, 773 F.3d at 1132; *Whiteside I*, 748 F.3d at 541; *Hawkins*, 706 F.3d at 820; *Sun Bear*, 644 F.3d at 700.

21. *Spencer II*, 773 F.3d at 1132; *Sun Bear*, 644 F.3d at 700.

22. For academic commentary on collateral challenges to the career offender enhancement, see, for example, Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499, 535, 542-43 (2014) (arguing for "flexible" resentencing because "convicts should not serve added time based on errors" and because finality considerations do not "play the same role" in the sentencing context); Sarah French Russell, *Reluctance To Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 104-15, 160-63 (2012) (arguing that individual and societal

contends that disagreement over the cognizability of these claims is actually about the nature of the harm in sentencing error. What federal courts are asking, in effect, is whether the lost probability of a lower sentence is itself a cognizable injury. Despite the prevalence of language about "probability" and "risk" in the career offender opinions,[23] courts rarely articulate the sentencing debate in these terms. This Comment focuses on the latent probability analysis in sentencing opinions. It argues that a new approach to cognizability—one characterized in terms of probability—would better address the harm at stake in sentencing.

The Comment proceeds in two Parts. Part I draws on an analogy to tort law to argue that sentencing debates are, at their core, about loss of chance. This Part highlights the role that probability plays in recent sentencing opinions. It argues that, as an empirical matter, loss of chance is an accurate way to describe sentencing error given the "anchoring effect" of the Guidelines on sentencing practices.

Part II makes the structural case for conceptualizing Guidelines sentencing error as a problem of probability. This Part argues that failure to recognize the probability dispute has obscured important debates about the continued vitality of the Guidelines system. After *United States v. Booker*, the Sentencing Guidelines are advisory in principle and influential in practice.[24] Part II argues that treating Guidelines error as loss of chance—a loss that can constitute a fundamental miscarriage of justice in the career offender context—is necessary in order to enforce a Guidelines regime that is neither too rigid nor wholly indeterminate. The Comment concludes that a loss of chance framework can help address core concerns in federal sentencing law.

interests in promoting justice outweigh finality interests and therefore favor collateral review of sentencing error, including in the career offender context); Julie Austin, Note, *Closing a Resentencing Loophole: A Proposal To Amend 28 U.S.C. § 2255*, 79 S. CAL. L. REV. 909, 944 (2006) (proposing limiting collateral challenges to prior convictions underlying a career offender determination, to further "efficiency and the finality of judgments").

23. *See, e.g.*, *Whiteside I*, 748 F.3d at 551 (drawing on the Supreme Court's observation that a higher Guidelines calculation leads to a "significant risk of a higher sentence" (quoting Peugh v. United States, 133 S. Ct. 2072, 2088 (2013)); *Hawkins*, 706 F.3d at 831 (Rovner, J., dissenting) (describing the "high probability of . . . a much longer sentence" due to the erroneous application of the career offender enhancement).

24. *See* United States v. Booker, 543 U.S. 220, 265 (2005) (invalidating the portions of the Federal Sentencing Act making the Sentencing Guidelines mandatory); *infra* notes 32-36 and accompanying text (discussing *Booker*'s effect).

I. THE PROBABILITY DEBATE

In appellate court opinions on career offender misapplication, judges have framed the debate over sentencing error in terms of fairness and finality.[25] Circuit courts that have held career offender misapplication not cognizable have emphasized the need for finality in order to minimize systemic burdens on the justice system.[26] In contrast, courts that have held sentencing error cognizable have stressed fairness to individual defendants.[27] The Fourth Circuit, for example, characterized its holding that career offender error is a fundamental miscarriage of justice as a determination that finality should not "outweigh the plain injustice" of precluding post-conviction review.[28] In holding career offender error *non*-cognizable, the Seventh Circuit majority faulted the dissent for failing to recognize "the difficulty of balancing 'fairness' (meaning what exactly?) against finality."[29] The Eleventh and Eighth Circuit opinions[30] and academic discussion[31] feature similar language.

This line of discourse has obscured the significance of the advisory Guidelines sentencing regime to these cases. In 2005, *United States v. Booker* invalidated the provisions of the Federal Sentencing Act making the Sentencing Guidelines mandatory.[32] Now, though federal courts still determine the recommended Guidelines sentence, that determination is not binding. The shift to an advisory regime leaves the Guidelines' juridical status unclear. The Su-

25. The fairness-finality debate is a familiar one in sentencing discussions. *See, e.g.*, Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151 (2014); Ron Marmer, *Error, Finality, and Fairness: Have We Got It Wrong?*, 38 LITIGATION 4 (2012).

26. *See Spencer II*, 773 F.3d at 1144 (citing deterrence and a certainty described as necessary to make law's "commands" "effective" as the reasons for valuing finality); *Hawkins*, 706 F.3d at 823-24. The Eighth Circuit opinion does not evince the same level of concern for finality, though the dissenting judges criticized the majority for valuing finality over substantive justice. *See Sun Bear*, 644 F.3d at 707 (Melloy, J., dissenting).

27. *Whiteside I*, 748 F.3d at 553; *Spencer I*, 727 F.3d 1076, 1090 (11th Cir. 2013), *rev'd en banc*, 773 F.3d 1132 (11th Cir.).

28. *Whiteside I*, 748 F.3d at 554.

29. Hawkins v. United States, 724 F.3d 915, 918 (7th Cir. 2013) (denying rehearing).

30. *See Spencer I*, 727 F.3d at 1090 (recognizing "the perennial concern about the justice system's need for finality"); *Sun Bear*, 644 F.3d at 707 (Melloy, J., dissenting) (criticizing the majority for "promot[ing] finality at the expense of justice").

31. *See* Gregory S. Dierdorf, Comment, *Yes, We Were Wrong; No, We Will Not Make It Right: The Seventh Circuit Denies Post-Conviction Relief from an Undisputed Sentencing Error Because It Occurred in the Post*-Booker*, Advisory Guidelines Era*, 9 SEVENTH CIRCUIT REV. 301 (2014) (arguing that legal developments have tipped the balance to fairness over finality).

32. 543 U.S. 220, 258-59 (2005).

preme Court has called the advisory Guidelines the "lodestone"[33] and "the starting point and initial benchmark"[34] of federal courts' sentencing.[35] Yet *Booker* describes the Guidelines as "merely advisory," and the significance of an "advisory" system is hotly contested.[36] Ultimately, disagreement over career offender resentencing is about the meaning of the post-*Booker* Guidelines: is the probability of a higher sentence due to Guidelines error a harm of its own?

Circuit court opinions on sentencing error do not treat the probabilistic question inherent in these cases in a systematic way; they do not even use the phrase "loss of chance."[37] But the valuative and the empirical questions running through the career offender debate are the essential questions of probabilistic analysis: whether Guidelines error represents a lost opportunity for a better outcome and the value of that loss to the person harmed. Courts disagree about whether missing out on the chance of a lower sentence can ever be a fundamental miscarriage of justice.

A. Chance as Value

When cast in these terms, the sentencing misapplication argument raises issues analogous to those implicated by the loss of chance approach in tort law. In medical malpractice cases, many jurisdictions use the loss of chance approach.[38] The idea underlying this doctrine is that the opportunity for a better outcome itself has value, such that deprivation of that chance may be a legally actionable harm.[39] Sentencing error debates can be understood along similar lines. Judges who argue that career offender misapplication may be a fundamental miscarriage of justice see the chance of a lower sentence as a harm in it-

33. Peugh v. United States, 133 S. Ct. 2072, 2084 (2013).

34. Gall v. United States, 552 U.S. 38, 49 (2007).

35. Using a forty-three-level Sentencing Table, a federal probation officer generates a sentencing range for an offense based on the individual's criminal history and the nature of the crime. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2014); *id.* ch. 1, pt. A, introductory cmt. The court then "make[s] an individualized assessment based on the facts presented" to determine the offender's sentence. *Gall*, 552 U.S. at 50. Throughout sentencing, the court must "remain cognizant of" the Guidelines range. *Id.* at 50 n.6.

36. *Booker*, 543 U.S. at 233; *see infra* notes 53-57 and accompanying text.

37. *See, e.g.*, Hawkins v. United States, 706 F.3d 820 (7th Cir. 2013).

38. *See* Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W. 2d 321, 329 (Minn. 2013) (citing DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS § 196 (2d ed. 2011)) (describing widespread application of loss of chance doctrine).

39. *See id.*; Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1354 (1981) (outlining the loss of chance doctrine).

self.[40] Those who reject cognizability do not view the probability of a different sentence as a harm requiring review because, even with a different Guideline recommendation, the judge may re-sentence the offender to the same term.[41]

In the medical malpractice context, loss of chance typically involves a two-step, proportional recovery analysis.[42] In the first step, the injury is conceptualized as the loss of an opportunity for a better outcome.[43] This characterization enables the plaintiff to recover when she cannot demonstrate preponderance-of-the-evidence causation of the ultimate injury but can show that it is more likely than not that the harm caused a diminished likelihood of a positive outcome.[44] Imagine, for example, that a person who died of cancer initially had a forty-percent chance of recovery, but that her physician's negligence decreased her chances to twenty-five percent. This person's estate could not prove that the physician's negligence caused her death.[45] But a loss of chance framework would cast the fifteen-percentage-point diminution in the possibility of recov-

40. *See, e.g.*, *Whiteside I*, 748 F.3d 541, 554-55 (4th Cir. 2014), *rev'd en banc*, 775 F.3d 180 (4th Cir.).

41. *See, e.g.*, *Hawkins*, 706 F.3d at 825; Sun Bear v. United States, 644 F.3d 700, 705-06 (8th Cir. 2011) (en banc).

42. Some jurisdictions use a "relaxed causation" approach to loss of chance, in which the plaintiff may recover the total amount in damages despite failing to meet the typical preponderance-of-the-evidence burden of proof. *See, e.g.*, Thompson v. Sun City Cmty. Hosp., Inc., 688 P.2d 605, 608 (Ariz. 1984) (holding that a jury may find for plaintiff so long as it "find[s] a *probability* that defendant's negligence was a cause of plaintiff's injury"). Unlike proportional recovery, relaxed causation does not take into account the value of the chance in determining the ultimate recovery; once the jury finds causation, a plaintiff recovers one hundred percent of the damages resulting from the worse outcome. *See Thompson*, 688 P.2d at 606-08; DOBBS ET AL., *supra* note 38, § 196. Proportional recovery is the dominant approach. *See Dickhoff*, 836 N.W.2d at 335; *see also* DOBBS ET AL., *supra* note 38, § 196 (describing an increase in the number of states adopting proportional recovery). Proportional recovery is also preferable for sentencing error because, unlike relaxed causation, it assigns weight in the analysis to both the magnitude and the likelihood of harm. *See infra* note 62 and accompanying text.

43. *See Dickhoff*, 836 N.W.2d at 334 (describing the "chance to survive or achieve a more favorable medical outcome as something of value"); Matsuyama v. Birnbaum, 890 N.E.2d 819, 832 (Mass. 2008) ("When a physician's negligence diminishes or destroys a patient's chance of survival, the patient has suffered real injury. The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome."); King, *supra* note 39, at 1354 (explaining that "the loss of a chance of achieving a favorable outcome . . . should be valued appropriately").

44. *Dickhoff*, 836 N.W.2d at 337; *Matsuyama*, 890 N.E.2d at 832.

45. Mandros v. Prescod, 948 A.2d 304, 310 (R.I. 2008); Gardner v. Pawliw, 696 A.2d 599, 608 (N.J. 1997); DeBurkarte v. Louvar, 393 N.W. 2d 131, 137 (Iowa 1986).

ery as a legally cognizable harm.[46] The loss of chance doctrine thus allows plaintiffs to recover where they otherwise might not.

Judges and scholars also use probabilistic reasoning in non-medical contexts. The Seventh Circuit applies a loss of chance approach to damages in employment discrimination cases.[47] When a fire department violated § 1983 and Title VII by maintaining racial quotas in promotions, the Seventh Circuit explained that the harm at issue was the lost chance of promotion for white applicants.[48] The Seventh Circuit required that the jury award damages equal to the product of the total lost benefits and the percentage chance of promotion in order to compensate for the lost opportunity.[49] Standing doctrine is another area in which probabilistic reasoning has begun to take hold. As Justice Breyer has emphasized, "courts have often found *probabilistic* injuries sufficient to support standing."[50] Commentators have suggested that the loss of chance doctrine best explains the existence of "actual or imminent injury" for standing in cases finding probabilistic harm, such as cases in which applicants challenge university programs' admissions policies.[51]

The role of probabilistic reasoning has not yet been recognized in the sentencing context.[52] This is a mistake given the centrality of probability in sen-

46. *See* McKellips v. St. Francis Hosp., Inc., 741 P.2d 467, 477 (Okla. 1987) (using these numbers as an example and determining that the damages are fifteen percent of the total damages for wrongful death).

47. Biondo v. City of Chicago, 382 F.3d 680, 688-89 (7th Cir. 2004); *see also* Doll v. Brown, 75 F.3d 1200, 1205-07 (7th Cir. 1996) (proposing the use of loss of chance in the Title VII employment discrimination damages context for the first time).

48. *Biondo*, 382 F.3d at 688.

49. *Id.*

50. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1160-2 (2013) (Breyer, J., dissenting) (quoting probabilistic language from at least twelve prior Supreme Court cases finding that the probability of injury sufficed for standing). The majority disagreed with Justice Breyer's analysis of probability's significance to standing. *See id.* at 1148 (majority opinion) ("[A] highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending.").

51. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1465 (1988) (arguing that a probabilistic theory of injury best explains standing for the applicant challenging the University of California at Davis's admissions policies in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)); *see also* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1288 (2013) (arguing for conceiving of standing through the lens of the expected value of harm). In such cases, of course, the applicant does not know for certain whether the admissions outcome would have been different had the program's policy been more favorable to the applicant.

52. For a nod to the significance of loss of chance to post-conviction sentencing challenges, see Ryan C. Thomas, Comment, *Not-So-Harmless Error: A Higher Standard for Mitigation Errors on Capital Habeas Review*, 89 WASH. L. REV. 515, 548-49 n.298 (2014). One commentator argues for a more-likely-than-not miscarriage of justice standard for cognizability of post-

tencing error cases. In misapplication cases, a major—if only implicit—point of disagreement is whether to conceptualize the harm in sentencing error as the lost probability of a different sentence.[53] Opinions holding career offender errors cognizable borrow the valuative terms of loss of chance doctrine. For example, the Fourth Circuit has argued that the "chance to be sentenced according to the factors that everyone agrees should apply" is significant in itself.[54] These opinions have tended to acknowledge that a new sentence could be the same as the first, since both would be within the permissible statutory range, but have emphasized the likelihood of a new sentence under a different Guidelines determination.[55]

Other courts argue that, post-*Booker*, a sentence within the statutory bounds can never be a fundamental miscarriage of justice because that sentence is lawful and could be imposed again.[56] The fact that a judge *could* order the same sentence, even under the new interpretation, means that the sentence must be just, no matter what the odds are that a judge *would* order a different

conviction challenges to sentencing error, including misapplications of the career offender enhancement: under such a standard, § 2255 relief would be available if "a reasonable judge would 'more likely than not' adopt a different sentence." *See* Garrett, *supra* note 22, at 528, 533-34. The lost-chance approach outlined in this Comment is preferable to a more-likely-than-not standard, because it better combats the legitimacy deficit by taking into account the magnitude of the harm as well as the probability of a different sentence. Under lost chance, unlike the more-likely-than-not approach, a fifteen-year difference in recommended sentence, for example, may be a fundamental miscarriage of justice even if the offender's original chance of obtaining that lower sentence was forty-nine rather than fifty-one percent.

53. Sentencing error itself is analogous to a tort, as it is the breach of a judge's duty to sentence according to the law, leading to injury. This line of analysis does not open floodgates of tort litigation given, inter alia, the absolute immunity for federal officials exercising the judicial function. *See* FALLON, JR. ET AL., *supra* note 15, at 995.

54. *Whiteside I*, 748 F.3d 541, 554-55 (4th Cir. 2014), *rev'd en banc*, 775 F.3d 180 (4th Cir.).

55. This emphasis on the probability of a new sentence is grounded in these opinions' perception that the Guidelines do affect sentencing. *Compare Whiteside I*, 748 F.3d at 553, *and* Sun Bear v. United States, 644 F.3d 700, 711 (8th Cir. 2011) (Melloy, J., dissenting), *with* Hawkins v. United States, 706 F.3d 820, 826-27 (7th Cir. 2013) (Rovner, J., dissenting) (characterizing the likelihood of receiving the same sentence without a career offender enhancement added to the Guidelines calculation as "*no* chance"). The strong empirical basis for this perception is discussed *infra* notes 63-65 and 76-81 and accompanying text.

56. *See Spencer II*, 773 F.3d 1132, 1140 (11th Cir. 2013) (en banc) ("Even if he is not a career offender, his sentence is lawful."); *id.* at 1142 ("The greater impact of one [sentencing] enhancement versus the lesser impact of another enhancement is immaterial because [both are] within the statutory limits imposed by Congress."); *Hawkins*, 706 F.3d at 825 (noting the possibility of an "identical sentence" on resentencing); *Sun Bear*, 644 F.3d at 705 (emphasizing that "the same . . . sentence could be reimposed" even without the career offender enhancement).

sentence.[57] These opinions do not view the lost chance of a lower sentence as an inherent harm. In arguing over the relative value of the probability of a lower sentence, these sets of opinions are actually, although they do not explicitly recognize it, arguing for and against conceiving of the harm from Guidelines sentencing error as loss of chance.

B. Anchoring Effects

The second step in loss of chance analysis starts from an empirical question: what is the value of the lost chance? In the medical malpractice context, the most common approach to this question is the proportional recovery rule, which values the lost chance as a compensable injury.[58] Under this approach, the plaintiff's decreased probability of a positive outcome is multiplied by the damages in the worse outcome in order to arrive at a final damages determination.[59] This step incorporates a factual determination about the medical professional's negligence into loss of chance analysis. If the decreased chance for a better outcome is *de minimis*, then there is no possibility of recovery.[60]

Debates over sentencing involve a similar empirical question about the extent to which the Guidelines influence judges. In tort law, the loss of chance question is how much a physician's negligence lowered the probability of a different outcome. The parallel question for sentencing error is how much the erroneous Guidelines range affected the original sentence.[61] If the Guidelines error lowered the chance of a different sentence, that decreased chance, together with the longer sentence, may make the harm a fundamental miscarriage of justice.[62]

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57. *See Whiteside I*, 748 F.3d at 570 (Wilkinson, J., dissenting) ("How is it that requiring someone to serve a sentence lawfully imposed . . . becomes a 'plain injustice' and a 'fundamental unfairness'?") (quoting *Whiteside I*, 748 F.3d at 554 (majority opinion)).

58. *See, e.g.*, Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W.2d 321, 335 (Minn. 2013) (justifying the proportional-recovery approach as the "most equitable method of apportioning damages consistent with the degree of fault"); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n (2010).

59. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n.

60. *See Dickhoff*, 836 N.W.2d at 334 n.13.

61. A starting point for determining the Guidelines' effect in a particular context is the Sentencing Commission's statistical data, which provides data on sentences within and without Guidelines range by offense category and guideline. U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2013), http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013 [http://perma.cc/TY5W-GZ2E].

62. To represent the doctrine mathematically, in tort: (damages for entire loss) × (chance of a different outcome) = (damages awarded). In the sentencing context, the equation would be:

There is reason to believe that the Guidelines *do* affect outcomes. In a heuristic pattern first identified by psychologists of judgment and decision-making in the 1970s, an initial quantitative starting point, or a suggested "anchoring" value, affects a final judgment by establishing a presumptive baseline.[63] The final determination or estimate will be closer to the anchoring value. Altering the initial anchoring value thus changes the final estimate. Social science research suggests that the Guidelines may in fact have such an "anchoring effect."[64] The Supreme Court has identified such anchoring as the *purpose* of the Guidelines.[65]

Courts construing sentencing error as a fundamental miscarriage of justice tend to emphasize the Guidelines' impact on judges' decision-making.[66] Using empirical evidence[67] and sentencing judges' accounts of how they arrived at their decisions,[68] judges stress that the Guidelines are the basis from which sentencing begins. In its since-overturned panel opinion holding the career offender enhancement cognizable, for example, the Eleventh Circuit highlighted Sentencing Commission data indicating that eighty percent of sentences fall within the Guidelines range or result from government motions for a down-

(magnitude of harm, which is time added to recommended sentence by Guidelines error) × (percentage chance of a different sentence) = (harm). If the harm in sentencing error is high enough, it constitutes a fundamental miscarriage of justice. Determining the point at which a sentencing error crosses the fundamental miscarriage of justice threshold is up to judges, who could create bright-line rules based on the mathematical formula or take a case-by-case approach.

63. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974) (identifying the anchoring heuristic and documenting its effect on estimates of the percentage of African countries that are United Nations members); Timothy D. Wilson et al., *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J. EXPERIMENTAL PSYCHOL. 387, 399 (1996) (determining "that completely arbitrary numbers can anchor people's judgments").

64. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 511 (2014); Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 439-443 (2011).

65. *See* Peugh v. United States, 133 S. Ct. 2072, 2083 (2013) (describing advisory Guidelines sentencing as "aim[ing] to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines").

66. *See, e.g.*, *Whiteside I*, 748 F.3d 541, 550-51 (4th Cir. 2014), *rev'd en banc*, 775 F.3d 180 (4th Cir.); *Spencer I*, 727 F.3d 1076, 1088 (11th Cir. 2013), *rev'd en banc*, 773 F.3d 1132 (11th Cir.).

67. *See, e.g.*, Hawkins v. United States, 724 F.3d 915, 920 (7th Cir. 2013) (Rovner, J., dissenting from denial of rehearing) ("[E]mpirical evidence supports the view that the Sentencing Guidelines greatly influence the sentences imposed by judges.").

68. *See, e.g.*, Hawkins v. United States, 706 F.3d 820, 831 (7th Cir. 2013) (Rovner, J., dissenting) (suggesting, as well, that the sentencing judge may have held an "forbidden presumption" in favor of the Guidelines).

ward departure.[69] The Eleventh Circuit panel also cited the sentencing judge's statement that the career offender enhancement had "essentially doubled" the offender's sentence.[70]

The converse view, expressed in opinions failing to find a fundamental miscarriage of justice, is that the Guidelines are "less serious" after *Booker*.[71] This view takes at face value the idea that judges will apply the steps of Guidelines doctrinal analysis mandated by the Supreme Court. Opinions based on this belief emphasize that the sentencing process requires that the Guidelines "not even be *presumed* reasonable"[72] and that the judge "make an independent determination."[73] The Seventh Circuit, for instance, concluded that, "calculating the guidelines range correctly . . . is less important now . . . ."[74] These opinions dispute the empirical significance of the Guidelines' anchoring effect, arguing that in the career offender context the offender's prior crimes independently explain why he or she received a higher sentence.[75]

Empirical evidence indicates that the latter approach is inaccurate.[76] Studies have documented the anchoring effect's impact on judges,[77] including in criminal sentencing, even when judges determine the starting point for a criminal sentence by rolling dice and know that their baseline is completely random.[78] In the aggregate, sentencing data suggest that the anchoring effect is borne out: 51.2% of all fiscal year 2013 sentences were within Guidelines range, and 27.9% were within the range of government-sponsored downward depar-

69. *Spencer I*, 727 F.3d at 1087-88, 1089.

70. *Id.*

71. *Hawkins*, 706 F.3d at 824; *see also Spencer II*, 773 F.3d 1132, 1142 (11th Cir. 2014) (en banc) (declining, "[i]n this post-*Booker* world," to find that Guidelines miscalculation may ever be a fundamental miscarriage of justice); *Whiteside I*, 748 F.3d at 560 (Wilkinson, J., dissenting) (quoting *Hawkins* and adding that Guidelines influence is insufficient "to activate collateral review").

72. *Whiteside I*, 748 F.3d at 560 (Wilkinson, J., dissenting).

73. *Hawkins*, 706 F.3d at 822-23.

74. *Id.* at 822.

75. *Id.* at 825. *Hawkins* also uses broader Sentencing Commission evidence, without taking downward departures into account, to find the Guidelines not highly influential. *Id.* at 824.

76. In fact, the Supreme Court has identified the anchoring effect as the purpose of the Guidelines, as noted *supra* text accompanying note 65. *See also* Bennett, *supra* note 64, at 523 ("It is hardly surprising that the United States Sentencing Guidelines still act as a hulking anchor for most judges.").

77. *E.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 791-92 (2001) (in an experimental setting, finding a statistically significant difference in judges' damages awards to plaintiffs depending on whether or not the judges had heard a motion to dismiss for failure to meet the federal diversity amount-in-controversy requirement of $75,000).

78. Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY AND SOC. PSYCHOL. BULL. 188, 197 (2006).

tures.[79] In other words, only 20.9% of all fiscal year 2013 sentences fell outside of Guidelines- or government-sponsorship-based determinations.[80] For career offenders in fiscal year 2012, roughly 30% of sentences fell within Guidelines range, while 41.1% of sentences were government-sponsored below-range sentences.[81]

The anchoring effect suggests that the Guidelines have a strong influence on offenders' ultimate sentences, making it likely, although not certain, that an individual would have had a different sentence if the initial benchmark were different. Because the Guidelines still affect judges in practice, the defendant's loss of chance in cases of sentencing error is real. In the career offender context, the likelihood that misapplied Guidelines affected the outcome—and the years at stake in that error—weigh in favor of cognizability.[82]

II. THE ADVISORY GUIDELINES SYSTEM'S CONTINUED LEGITIMACY

Characterizing sentencing error as loss of chance captures the empirical reality that Guidelines errors make a harsher sentence more probable. Structural concerns also support a loss of chance framework. The post-*Booker* Guidelines run two risks. First, the fact that the regime is discretionary in principle but anchoring in fact may create a legitimacy deficit. Second, such a regime threatens to upset the delicate balance that the Guidelines have struck between indeterminacy and rigidity in criminal sentencing. Recognizing Guidelines error as injury due to loss of chance—and significant error in the career offender context as a fundamental miscarriage of justice—is necessary in order to avert these problems and reinforce the advisory Guidelines regime.

The loss of chance framework can help to avoid what procedural justice theory terms a "legitimacy deficit."[83] Drawing on social psychology, procedural justice scholars have identified the perception that a legal authority's decision-

79. U.S. SENTENCING COMM'N, *supra* note 61, at tbl.N, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/TableN.pdf [http://perma.cc/UH75-HT9G].

80. *See id.*

81. *Quick Facts: Career Offenders*, U.S. SENTENCING COMMISSION (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [http://perma.cc/JF4Q-Q5MT].

82. The loss of chance approach does not reject the fairness-finality debate. Rather, this framework highlights the institutional importance of the potential for resentencing and redefines the nature of the harm of sentencing error. Between fairness and finality, a loss of chance approach supports the individual fairness rationale.

83. *See* Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 133 (2013) (citing DAVID BEETHAM, THE LEGITIMATION OF POWER 22 (1991)).

making procedures are fair as a reason that people view the criminal justice system as an authoritative set of rules that they ought to obey.[84] According to this line of reasoning, procedural transparency and consistency promote the rule of law. As Sarah French Russell points out, a systemic failure to "correct clear injustices that are easy to fix" undermines the current United States sentencing regime's legitimacy.[85]

The legitimacy problem is particularly acute in the context of Guidelines misapplication. Tom Tyler has identified both the "quality of decision making" and the "understandability of actions" as "antecedents of procedural justice" that heighten people's beliefs in the legitimacy of the legal system and actually reinforce its legitimacy.[86] Perceptions of both of these characteristics are at stake in the cognizability of sentencing error. Intuitively, people often feel that the lost chance of a better outcome is itself an injury.[87] The federal sentencing system's failure to recognize this harm as significant may challenge perceptions of the quality of sentencing, particularly in light of the effects of anchoring bias.[88] The perception that the resentencing system is arbitrary, or that it is func-

84. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003); *see also* Jeffrey Fagan, *Legitimacy and Criminal Justice: Introduction*, 6 OHIO ST. J. CRIM. L. 123, 124 (2008) ("The modern crisis of legitimacy in American criminal justice spans . . . concerns about procedural fairness and respectful treatment that recognizes citizen rights and treats people with dignity . . . ."); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2272 (2014) (describing legitimacy as "self-reinforcing" in terms of "compliance, deference, and cooperation").

85. Russell, *supra* note 22, at 87.

86. Tyler, *supra* note 84, at 299-300.

87. Loss of chance recognizes this intuition in the medical malpractice context. *See supra* notes 43-46 and accompanying text.

88. These problems are likely particularly pronounced due to the racial disparity in career offender sentencing—individuals sentenced under career offender Guidelines calculations are disproportionately African-American. *Quick Facts: Career Offenders*, *supra* note 81. In fiscal year 2012, 61.9% of those designated career offenders were African-American, 20.1% were white, 16.3% were Latino, and 1.8% were of another race or ethnicity. *Id.* By comparison, in fiscal year 2013, 20.6% of all federal offenders were African-American, 23.8% were white, 51.5% were Latino, and 4.1% were another race or ethnicity. U.S. SENTENCING COMM'N, *supra* note 61, at tbl.4, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table04.pdf [http://perma.cc/Q9KH-7ZEY]. Career offender error therefore runs a particular risk of deepening an existing legitimacy deficit in African-American communities: African-Americans are more likely to report that a received outcome in the justice system was not deserved and to evaluate legal authorities less positively than are other racial and ethnic groups. *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 145-49 (2002).

tioning in a less discretionary manner than *Booker* suggests, risks undermining the legitimacy of post-*Booker* sentencing.[89]

The loss of chance framework also reinforces the Guidelines' significance in the eyes of judges. For the past half-century, American sentencing has struggled with problems of both indeterminacy and rigidity.[90] Sentencing reforms have vacillated between efforts to make the system more flexible, on one hand, and more predictable on the other.[91] The paradox of the advisory Guidelines system is that it is both flexible and rigid: the Guidelines draw their power simultaneously from judges' awareness of their advisory nature and from their anchoring effects on judicial decision-making. The current advisory Guidelines system strikes a balance between the harshness of mandatory Guidelines[92] and the pre-1984 indeterminate federal sentencing regime, which created disparities in sentences that implicated issues of bias against minorities.[93]

This careful balance rests on judges' continued recognition that the Guidelines are meaningful. If judges begin to perceive the "merely advisory" Guidelines as having little persuasive power, then the sentencing system may revert to pre-Guidelines indeterminacy.[94] However, if judges fail to appreciate the Guidelines' actual power, then judges may become less sensitive to miscalculation and less willing to confront the inequities that are systemically built into the Guidelines.[95] Extensive scholarship on the anchoring effect suggests that

89. Whether such perceptions of arbitrariness currently exist would be a fruitful avenue for further research.

90. *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (narrating the arc from indeterminate sentencing in the 1970s to rigid application of the Federal Sentencing Guidelines in the early 1990s).

91. *Id.*

92. *See* Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 681 (2011) (characterizing the pre-*Booker* Guidelines regime as "creat[ing] structural disparity" due to "rigid compliance," particularly in ways that created higher average sentences for African-Americans).

93. The Sentencing Commission and its promulgated Guidelines are the product of an attempt by the Sentencing Reform Act of 1984 to create greater uniformity in federal sentencing. *See* Russell, *supra* note 22, at 90 (explaining that "concerns about unwarranted disparities in sentences" led to the Sentencing Reform Act of 1984); Stith & Koh, *supra* note 90, at 227-28 (describing criticisms of 1970s indeterminate sentencing).

94. *But see* Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 137-38 (2006), http://www.yalelawjournal.org/forum/what-yogi-berra-teaches-about-post-booker-sentencing [http://perma.cc/Z5K3-AV6V] (asserting that sentencing will not revert to indeterminacy under the Guidelines). Given the Supreme Court's multiple post-*Booker* affirmances that the Guidelines remain the "touchstone" for sentencing, this outcome seems especially unlikely. *See supra* notes 33-35 and accompanying text.

95. The most notable inequity in federal sentencing is the eighteen-to-one sentencing disparity for offenses involving crack versus powder cocaine. *See* Fair Sentencing Act of 2010, Pub. L.

the greatest threat to the post-*Booker* system is judges' underestimation of the Guidelines' effect on their own sentencing practices.[96] When judges believe the Guidelines have no real force, they may fail to appreciate the subtle but real effect the Guidelines have in creating a baseline for their sentencing determinations. The loss of chance framework corrects for this error by signaling to judges that the Guidelines continue to have practical significance and by requiring judges to think carefully about the effect of Guidelines error in particular cases.

Ultimately, the failure to recognize that significant Guidelines error can be a fundamental miscarriage of justice—because it represents a loss of chance—risks devaluing the Guidelines *in the eyes of judges*.[97] In order for the Guidelines to continue to function as a compromise between indeterminacy and rigidity, courts must act in accordance with the principle that the Guidelines matter. Framing the harm at stake in sentencing as a loss of chance of a lower sentence encourages such an approach. The loss of chance analogy, borrowed from tort law and familiar from other probabilistic reasoning in law, can help to maintain the integrity of the current Guidelines regime.

CONCLUSION

Framing sentencing error as loss of chance highlights an institutional value: the continued vitality of the advisory Guidelines regime. Underlying sentencing miscalculation cases is a larger post-*Booker* debate about the significance and structure of non-mandatory Guidelines.[98] While scholars continue to debate whether the post-*Booker* system is an improvement, the advisory structure is here to stay. *Booker* unraveled the mandatory sentencing regime,[99] and a return to an indeterminate sentencing system seems not only undesirable

No. 111-220, 124 Stat. 2372 (2010) (codified in scattered sections of 21 U.S.C.); Dorsey v. United States, 132 S. Ct. 2321, 2329 (2012) (describing the Fair Sentencing Act as changing the disparity between crack and powder offenses in federal sentencing to eighteen-to-one). Other inequities include the career offender enhancement's particularly harsh treatment of prior drug offenses and the benefits that accrue to the first defendant who provides information to the prosecutor. *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1683 nn.282 & 284 (2012).

96. *See* Gertner, *supra* note 94, at 137 (pointing out that "announcing that the Guidelines are advisory *does not make them so*").

97. *Cf. id.*

98. *See generally* Baron-Evans & Stith, *supra* note 96 (defending the post-*Booker* system and arguing against proposed "fixes"); *see also* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 461 (2010) (criticizing post-*Booker* sentencing as "obviously neither simple nor . . . logical").

99. United States v. Booker, 543 U.S. 220, 248-49 (2005).

but also unlikely.[100] The pressing question, then, is how best to cognize errors within the regime we have.

Academic commentary praising the advisory Guidelines system highlights its flexibility[101] and its potential to make judges more cognizant of their choices.[102] Because the Guidelines gain their force from their anchoring effect on judges,[103] sentencing doctrines should recognize the Guidelines' impact on the probability of a certain sentence. Guidelines errors of serious magnitude, like the career offender enhancement, should be understood as fundamental miscarriages of justice so that judges and other actors in the criminal justice system continue to place serious weight on the Guidelines.[104] In a post-*Booker* world, the least desirable outcome would be a sentencing regime in which sentencing guidelines are considered insignificant[105] but continue to have a major effect on sentencing.[106] Such a system would combine the worst aspects of sentencing: the potential for indeterminacy and a lack of transparent reason.

Characterizing sentencing error as loss of chance averts this outcome. This framework explicitly recognizes the reality of the Guidelines' impact on sentencing. It also acknowledges that when, for instance, nine years of a person's life are at stake, the likely effect of an error in Guidelines calculation is a fundamental miscarriage of justice. In order to maintain the continued relevance of the Guidelines, courts should recognize that the baseline norm affects probabilities in a case like DeAngelo Whiteside's. For Mr. Whiteside, and for other defendants sentenced in error, the loss of chance may itself be a significant harm.

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100. *Cf.* Russell, *supra* note 22, at 90 (describing how the Sentencing Reform Act of 1984 arose from concerns about indeterminate sentencing). *But see* Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 28 CRIM. JUST. 26 (2014).

101. *See, e.g.*, Baron-Evans & Stith, *supra* note 96, at 1681.

102. *See, e.g.*, Hofer, *supra* note 92, at 676.

103. *See supra* notes 63-65 and 76-81 and accompanying text.

104. *But cf.* Hawkins v. United States, 706 F.3d 820, 824 (7th Cir. 2013) (labeling an error in Guidelines interpretation as "less serious" now that the Guidelines are advisory).

105. *Cf. Hawkins*, 706 F.3d at 824.

106. *See supra* text accompanying notes 83-89.

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